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In the Supreme Court of the United States

OCTOBER TERM, 1990

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

BOSTON AND MAINE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Interstate Commerce Commission is not empowered by Section 402(d) of the Rail Passenger Service Act of 1970, 45 U.S.C. 562(d), to approve the condemnation by the National Railroad Passenger Corporation (Amtrak) of railroad track that Amtrak intends to reconvey to another railroad.

2. Whether the court of appeals erred, on rehearing, in persisting in that holding despite Congress's amendment of Section 402(d), in direct response to the court's initial decision, to clarify that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act" (Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4658).

3. Whether the Commission's allowance of Amtrak's condemnation and subsequent conveyance should have been upheld by the court of appeals in this case.

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v.

BOSTON AND MAINE CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Interstate Commerce Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (90-1419 Pet. App. 5a-27a)[1] is reported at 911 F.2d 743. The order

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[1] A petition for a writ of certiorari (No. 90-1419) seeking review of the same judgment was filed on March 11, 1991, by the National Railroad Passenger Corporation and the Central Vermont Railway, Inc. References to "Pet. App." in this petition are to the Appendix to that petition.

The parties to the proceedings in the court of appeals, in addition to the Interstate Commerce Commission and the United States, were Boston and Maine Corporation, Canadian

of the court of appeals on the denial of rehearing (Pet. App. 1a-4a) is reported at 925 F.2d 427. The final decision of the Interstate Commerce Commission (Pet. App. 29a-109a) is reported at 4 I.C.C.2d 761. Interim decisions of the Commission served July 5, 1988, May 25, 1988, and April 29, 1988 (Pet. App. 110a-112a, 113a-118a, 119a-135a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. The petitions for rehearing were denied on February 1, 1991. Pet. App. 1a. On April 23, 1991, Chief Justice Rehnquist extended the time within which to petition for a writ of certiorari to and including May 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Rail Passenger Service Act, 45 U.S.C. 545(d), 562, and the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4658, are set forth in an appendix (Pet. App. 136a-145a).

STATEMENT

This case involves the exercise by the National Railroad Passenger Corporation (Amtrak) of its statutory power to condemn a line of track belonging to the Boston and Maine Corporation (B&M) and then reconvey the track to the Central Vermont Rail-

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Pacific, Ltd., Central Vermont Railway, Inc., Commonwealth of Massachusetts, National Railroad Passenger Corporation, Railway Labor Executives Association, State of Vermont, and Windsor Minerals, Inc.

way, Inc. (Central Vermont). The transaction resulted from Central Vermont's agreement to restore and maintain the track in a condition suitable for use by Amtrak's high-speed passenger trains, and thereby enable Amtrak to resume its "Montrealer" service to Canada. After analysis of the transaction, the Interstate Commerce Commission (ICC) issued orders allowing the condemnation and transfer to proceed. On B&M's petition for review, the court of appeals ruled that Amtrak could not condemn a fee interest in track for the purpose of transferring it to another railroad, and it set aside the condemnation as not authorized by 45 U.S.C. 562(d). While petitions for rehearing were pending, Congress amended 45 U.S.C. 562(d) with a provision applicable to pending cases (Independent Safety Board Act Amendments of 1990 (ISBA), Pub. L. No. 101-641, § 9, 104 Stat. 4658), making clear that Amtrak is authorized to condemn property and reconvey it to a third party if the ICC concludes that the reconveyance furthers the purposes of the statute. The court of appeals nevertheless denied rehearing, stating that its judgment was not affected by the amendment.

A. The Statutory Scheme

Amtrak is a private, for-profit corporation created by Congress in order to revitalize and maintain intercity and commuter passenger train travel in the United States. 45 U.S.C. 541. In the statute that created Amtrak, the Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91-518, 84 Stat. 1327, Congress recognized that Amtrak would run its passenger trains primarily over existing and future track systems of freight railroads rather than constructing or purchasing its own track networks; ac-

cordingly, it authorized Amtrak to enter into agreements, *inter alia*, for the use of the tracks of other railroads. 45 U.S.C. 562(a). Congress further provided that if Amtrak and the railroads cannot reach agreement on their own, Amtrak may request the ICC to prescribe necessary trackage rights agreements. 45 U.S.C. 562(a).

Three years after enacting RPSA, Congress amended it to confer condemnation authority on Amtrak. Observing that Amtrak's "inflexible site requirements" might reduce its bargaining leverage and expose it to unreasonable demands with respect to property it needed to acquire from railroads, see S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), Congress authorized Amtrak to condemn the property of other railroads that was "required for intercity rail passenger service," provided that Amtrak and the railroad could not agree on terms of sale, and Amtrak's "need" for the property was established by an order of the ICC. 45 U.S.C. 562(d)(1). RPSA further provides that the need of Amtrak "shall be deemed to be established" unless the ICC finds that (A) conveyance to Amtrak "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* (B) Amtrak can fulfill its obligations by acquiring an alternative property interest that is "available for sale on reasonable terms," or is available through the exercise of Amtrak's power under a companion condemnation provision (45 U.S.C. 545(d)) to acquire non-rail private property. 45 U.S.C. 562(d)(1).[2]

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[2] As noted, Congress amended 45 U.S.C. 562(d) following the panel's rejection of the ICC's decision in this case; the amendment is discussed at pp. 10-11, *infra*.

B. The ICC's Determinations

1. In 1972, Amtrak began providing passenger train service on the "Montrealer" between Washington, D.C., and Montreal, Canada. In crossing portions of New England, the Montrealer used the tracks of the Connecticut River Line (Conn River Line), including a 48.8 mile stretch of track owned by B&M running between Brattleboro, Vermont, and Windsor, Vermont. In 1977, Amtrak and B&M had entered into a trackage rights agreement covering this stretch. Over time, however, B&M failed to maintain the tracks in a suitable condition to permit Amtrak to provide the high-speed service needed for Amtrak's trains. Because of the track's inadequate condition, Amtrak discontinued its Montrealer service on April 5, 1987.[3] Pet. App. 9a, 121a-122a.

Convinced that B&M would not upgrade the track to the condition Amtrak required, Amtrak explored whether Central Vermont would do so. After discussions, Amtrak and Central Vermont agreed to the

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[3] In 1987, Amtrak instituted an arbitration proceeding claiming that B&M had breached its maintenance obligations; B&M refused to arbitrate, claiming that the trackage rights agreement had expired. The D.C. Circuit eventually ordered B&M to arbitrate the dispute. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 850 F.2d 756, 758 (1988). Subsequently, the arbitration panel concluded that B&M had breached its obligation to use its best efforts to maintain the track at the minimum speeds required by Amtrak; the panel found that B&M had deliberately allowed the line to deteriorate and had made essentially no efforts to maintain it. B&M had taken this course of action because its parent company determined to devote energies and funds to maintaining a parallel rail line the parent controlled. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, NAP Cases Nos. 72, 74 (Nat'l Arb. Panel Nov. 7, 1988).

following terms: (1) Amtrak would exercise its condemnation power under 45 U.S.C. 562(d) to acquire the track in question from B&M; (2) Amtrak would immediately reconvey the track to Central Vermont; (3) Central Vermont would repair and rehabilitate the segment to meet Amtrak's standards; (4) Central Vermont would grant trackage rights to B&M for it to serve its existing customers, and (5) Amtrak would be granted trackage rights for its Montrealer service for 20 years. Amtrak's responsibility to pay for rehabilitation of the track was capped at $3.1 million, with funds to come from a $5 million grant that Congress had appropriated for Amtrak to restore Montrealer service.[4] Pet. App. 10a-11a, 41a-42a, 122a-123a, 130a n.11.

2. As a prerequisite to invoking condemnation, Amtrak offered to purchase the segment of track from B&M. After B&M refused the offer, Amtrak requested the ICC to institute condemnation proceedings under 45 U.S.C. 562(d). In addition, Central Vermont requested an exemption from regulation for its acquisition of the former B&M line from Amtrak and its grant of trackage rights to B&M.[5] Pet. App.

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[4] Act of July 11, 1987, Pub. No. 100-71, 101 Stat. 447-448 (providing funding to improve track as needed "to restore railroad passenger service between Springfield, Massachusetts and Montreal, Canada through Vermont").

[5] The Central Vermont transactions were subject to a requirement of ICC approval under 49 U.S.C. 11343. Pursuant to 49 U.S.C. 10505(a), however, the ICC is required to exempt a transaction from regulation when it finds that application of a provision of the Interstate Commerce Act is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a, and either the transaction's scope is limited, or regulation "is not needed to protect shippers from the abuse of market power."

12a, 29a-30a, 119a-120a, 125a. After noting that "this is an extraordinary proceeding," representing only the first decided case in which Amtrak had invoked Section 402(d) of RPSA, Pet. App. 39a, the ICC approved the applications of Amtrak and Central Vermont. *Id.* at 29a-109a.

In its interim and final decisions, the ICC rejected B&M's plea to convert Amtrak's condemnation application under Section 402(d) into a request for trackage rights under Section 402(a). It found that Amtrak had an "election of remedies" to proceed under subsection (d), and pointed out that "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." [6] Pet. App. 39a, 115a-116a. The ICC further found that Amtrak had legitimate purposes for the acquisition and was not abusing its condemnation powers to advance private aims of Central Vermont or its parent company, the Canadian National Railway. *Id.* at 41a-43a. The ICC responded to the concern raised by B&M that Amtrak's interpretation of the statute would "encourage any freight railroad to acquire ownership of a competitor's line simply by currying Amtrak's favor and agreeing to grant trackage rights to the former owner," by noting that the Commission's regulatory review of Amtrak's transfer

[6] The ICC noted B&M's claim that it stood ready to restore the track if adequately compensated, and that it would submit to a third party decisionmaker (such as the ICC) the issue of how to allocate costs to maintain the line at the speeds required by Amtrak. But the ICC found that nothing in the Act *demanded* that Amtrak pursue trackage rights procedures rather than invoking condemnation-and-transfer procedures. Pet. App. 114a-116a.

of condemned property to another railroad would prevent any abuses. *Id.* at 43a.[7]

The ICC also concluded that Amtrak's statutory "need" for the conveyance was established. See 45 U.S.C. 562(d)(1)(A) and (B). The Commission found that "there is no adequate alternative property available for Amtrak to acquire" for its Montrealer service because Amtrak desires to route the Montrealer through Vermont, and alternative routes are prohibitively expensive to rehabilitate. Pet. App. 45a-46a. The ICC also found that B&M would not suffer "significant impairment" in its common carrier operations because it will receive just compensation for its property and can continue to serve local traffic under a trackage rights agreement. *Id.* at 46a. Having approved the condemnation, the ICC then exempted from regulation Amtrak's conveyance of the line to Central Vermont, finding that the competitive situation on the Conn River Line would not be adversely affected (and, indeed, would be improved), and that B&M as well as Central Vermont would benefit from "rehabilitation of the line" which was "desperately in need of maintenance." *Id.* at 84a.

Pursuant to the ICC's orders, B&M's line was conveyed to Amtrak (for just compensation), and Amtrak immediately reconveyed the line to Central Vermont. Applying funds provided by Amtrak, Central Vermont upgraded the track, and Montrealer service resumed in July 1989. Pet. App. 13a.

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[7] The ICC declined to address B&M's claim that the condemnation power, as construed by Amtrak, was unconstitutional, but noted that it believed that the condemnation power exercised here fulfilled a valid public purpose. Pet. App. 44a-45a.

C. The Court of Appeals' Decision

1. On B&M's petition for review, a divided court of appeals set aside the ICC's order approving the conveyance of the line to Amtrak. Pet. App. 5a-23a. The majority declared that under the terms of the statute, Amtrak was not authorized to exercise condemnation power "to force the conveyance of property from one private owner to another" because such a transaction did not satisfy Section 402(d)'s provision that condemned property must be "required for intercity rail passenger service" by Amtrak. In this case, the court stated, Amtrak did not "require" title to the entire fee interest in B&M's line, but needed only *use* of the rail line in a condition adequate for Montrealer service. To obtain that interest, Amtrak could have invoked the mandatory trackage rights procedures established by 45 U.S.C. 562(a). Moreover, the court thought that permitting this transaction would compromise a statutory policy against cross-subsidization of one segment of the rail industry by another, because it would invite Amtrak to shop for a below-cost provider of trackage rights. Finding the statute to be "unambiguous" on this point, the court declined to defer to the ICC's contrary interpretation of Section 402(d). Pet. App. 16a-18a, 20a, 22a-23a.

In the alternative, the court concluded that the ICC had not sufficiently explained why Amtrak's "need" was established under Section 402(d)(1)(A) and (B). In criticizing the ICC's finding that B&M's operations would not be significantly impaired, the court found error in the ICC's reliance on the trackage rights agreement that B&M would be granted after the conveyance; according to the court, the statute mandates consideration of the impact of the

transaction without regard to post-conveyance "remedies aimed at ameliorating the impairment." Pet. App. 19a. The court also rejected the ICC's finding that Amtrak had no adequate alteratives to condemning the fee, because the ICC had not explained why the lesser interest of an easement for use of the track, or prescriptive trackage rights, would be inadequate. *Id.* at 19a-20a.

Finally, the court found its construction of the statute confirmed by the constitutional questions it thought would be raised if Amtrak were empowered to condemn private property to transfer it to another private owner, and the absence of a clear statement from Congress that it intended to permit that result. Pet. App. 21a-23a.

Judge Ruth B. Ginsburg concurred in the judgment, but disagreed with the majority's interpretation of the statute. She concluded that even when Amtrak's ultimate goal is only the use of the track, Amtrak was not precluded from condemning a fee interest, provided that the transaction was necessary to enable Amtrak's passenger service to go forward. In her view, a railroad's intransigence in refusing to restore track that Amtrak needed to use would satisfy that test. Although Amtrak advanced such an account of events, she believed the ICC had not made a determination crediting Amtrak's story. Accordingly, Judge Ginsburg concluded that a remand was required. Pet. App. 24a-27a.

2. The ICC and Amtrak petitioned for rehearing. While the petitions were pending, Congress amended the statute to overturn the majority's construction—and, specifically, to permit the present transaction to be consummated [8]—by adding to 45 U.S.C. 562(d)(1)

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[8] See 136 Cong. Rec. S17,668 (daily ed. Oct. 27, 1990) (statement of Sen. Jeffords).

the provision that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." ISBA, Pub. L. No. 101-641, § 9, 104 Stat. 4658. The amendment was explicitly made applicable to pending cases. *Id.* § 9(b).

The court nevertheless denied the petitions for rehearing. The majority interpreted the amendment to apply only to conveyances that occur *after* Amtrak has properly condemned property; the court proclaimed that the amendment did not alter the limit on Amtrak's condemnation authority that the subject property be "required for intercity rail passenger service"—a requirement that, in the court's view, could not be fulfilled when Amtrak could have "instead achieve[d] the objective necessary for passenger service by taking a lesser interest or by using its subsection (a) power." Pet. App. 3a. The court further stated that its holding rested on perceived deficiencies in the ICC's findings under 45 U.S.C. 562(d)(1)(A) and (B) with respect to Amtrak's "need" for the property, and that those holdings were not affected by the amendment. Pet. App. 3a. Judge Ginsburg reiterated her disagreement with the majority's interpretation of the statute, concluding that the amendment "coincide[d]" with her view that the ICC had "plausibly interpreted * * * 45 U.S.C. § 562." Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

The court of appeals has improperly restricted an important statutory tool that Congress gave to Amtrak to further the provision of efficient long-distance passenger-train service. Distorting the language of

the statute to find it "unambiguous," and disregarding the interpretation advanced by the responsible agency, the court—guided by its own vision of wise policy—held that the ICC cannot rely on Section 402(d) to permit Amtrak to condemn rail property when Amtrak intends to reconvey it to another railroad. It reached that conclusion despite the ICC's determinations that Amtrak had met the requirements of Section 402(d), and that the conveyance served a legitimate public purpose in Amtrak's effort to put its Montrealer train back in service. Congress reacted swiftly to the court's misapprehension of the scope of Section 402(d), amending the law to clarify that the ICC could authorize a transaction like the present one upon finding that it furthers the purposes of RPSA. On rehearing, however, the court defied that congressional directive, construing the amendment to deprive it of its plainly intended function.

That frustration of congressional will justifies review and reversal by this Court. Because challenges to all ICC condemnation orders can be brought in the D.C. Circuit, the decision below effectively sets a nationwide precedent. Moreover, the decision has deleterious effects. In the short-term, it disrupts Amtrak's Montrealer service through Vermont and squanders the resources invested in that venture; in the long-term, it hobbles Amtrak's negotiating position in reaching trackage-rights agreements with the nation's freight railroads, whose tracks were recognized by Congress to be indispensable to Amtrak's mission. These results not only undermine Congress's commitment to an alternative means of public transportation, but also threaten to drive up the costs borne by the government to subsidize Amtrak's operations. Finally, the court's decision flouts the princi-

ples of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and ignores the clearly expressed will of Congress in the amended statute. Accordingly, this Court's review is warranted.

1. a. The court of appeals concluded that RPSA's Section 402(d) was "unambiguous" in precluding Amtrak from condemning rail property for the purpose of conveying that property to another railroad. Pet. App. 23a. That holding purported to rest on the "plain meaning" (*ibid.*) of the provision that Amtrak's condemnation power applies to property interests "required for intercity rail passenger service." 45 U.S.C. 562(d). But neither the language of the statute nor its structure and underlying policies support the court of appeals' cramped construction. Rather, because Section 402(d) fails to speak unambiguously to this issue, deference was owed to the ICC's reasonable interpretation of the provision. *Chevron*, 467 U.S. at 844 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation by * * * an agency"); *Mobil Oil Exploration & Production Southeast Inc.* v. *United Distribution Co.*, 111 S. Ct. 615, 624 n.5 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988).

Section 402(d)(1) states:

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the [ICC] for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on

> reasonable terms and conditions, including just compensation.

45 U.S.C. 562(d)(1).

That language simply does not address the issue of whether Amtrak can condemn rail property and then convey it to another railroad. The most natural reading of the statute is that where Amtrak has made a reasonable business judgment that acquisition of property will promote intercity passenger service, the ICC is empowered, if the parties cannot agree on a sale, to order its conveyance upon making a statutory finding of "need." The property to be condemned must be "required for intercity rail passenger service"; this means that Amtrak may not condemn property for reasons unrelated to its train services. But nothing in the quoted language prohibits Amtrak from condemning property and transferring it to another railroad, when such action meets the statutory standard.[9]

Nor does anything in the structure of the statute require Amtrak to resort to prescribed trackage rights under Section 402(a) rather than exercising the power of condemnation-and-reconveyance under Section 402(d). The court of appeals erred in concluding that an "interplay" between the two provisions limits Amtrak's exercise of authority to invoke condemnation. Pet. App. 22a. Subsection (d) does not even refer to subsection (a), let alone condition the condemnation power on the exhaustion of prescriptive trackage rights. The two provisions create

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[9] The use of the word "required" does not imply that the property must be indispensable to Amtrak. See *Webster's Third New International Dictionary* 1929 (1986) (defining "require" to include the meaning "to call for as suitable or appropriate in a particular case").

distinct procedures that address distinct situations. As the ICC found, Amtrak has an "election of remedies" to invoke the condemnation power, provided it can satisfy the express statutory requirements set forth in that provision. Pet. App. 39a, 116a. In the guise of statutory interpretation, the court simply rewrote the statute to add a requirement not enacted by Congress. See *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 309 (1989) (in construing a statute, Court is "not at liberty to create an exception where Congress has declined to do so").[10]

The court of appeals' view of what is "required" for intercity passenger service is diametrically opposed to the Second Circuit's recognition, in construing identical language in a companion condemnation provision, that Amtrak *may* condemn a fee interest in property even where Amtrak's purpose is to transfer the fee to a new owner and reserve only an easement for itself. In *National R.R. Passenger Corp.* v. *Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), cert. denied, 484 U.S. 954 (1987), Amtrak condemned two riverside parcels of property in order to convey them to the City of New London, which had agreed to construct a service road next to Amtrak's right-of-way;

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[10] Indeed, the structure of the Act strongly suggests that Congress did not intend the phrase "required for intercity rail passenger service" to contain an implicit requirement that Amtrak must first seek the "lesser interest" of trackage rights, or condemn only an easement, before it may condemn a fee and transfer it to another party. Congress gave detailed consideration to the issue of what lesser interests Amtrak had to consider as reasonable alternatives to condemnation, and spelled out its answer in 45 U.S.C. 562(d)(1)(B). It is highly implausible that Congress tucked away a *second* "no lesser alternative" requirement in the general language cited by the court.

Amtrak reserved a permanent easement for itself permitting access to its facilities for inspection and maintenance. The property owner challenged the transaction on the ground that Amtrak was not authorized to condemn land for the purpose of reconveying it to another party under 45 U.S.C. 545(d).[11] The court interpreted that provision, with its proviso that the condemned property must be "required [for] intercity rail passenger service," in light of Congress's direction that Amtrak should exercise its "best business judgment in taking actions to minimize Federal subsidies," 45 U.S.C. 501a(1), and its encouragement of States, local governments, and the private sector "to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies," 45 U.S.C. 501a(2). Against that background, the Second Circuit rejected the contention that Amtrak could not condemn property for the purpose of transferring it to the city. Instead, it found "no impropriety in Amtrak's condemnation of property within the scheme of an overall cooperative agreement with New London and [the Federal Railroad Administration] whereby the service road, the need for which is unchallenged, is maintained by New London." 822 F.2d at 1265.

The same logic dictates that Amtrak can properly condemn a line of track for conveyance to, and maintenance by, another railroad. In seeking to distin-

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[11] That provision, which was enacted contemporaneously with Section 402(d) of RPSA, states that Amtrak may acquire by eminent domain "any right-of-way, land, or other property" not belonging to a railroad or state or local government, and "which is required [for] intercity rail passenger service."

guish *Two Parcels*, the court of appeals here suggested that the property condemned in that case met the criterion of "required for intercity rail passenger service" because Amtrak's need for a new service road was "unchallenged," and the condemnation of property for construction of the road bore a "significant relationship" to passenger service. Pet. App. 2a. But those characteristics are present here as well. Amtrak had an "unchallenged" need to have the segment of track restored, and condemned it so that another party could undertake the restoration. That action bore a "significant relationship" to the goal of providing Montrealer service.

Nor does the absence in *Two Parcels* of a provision comparable to Section 402(a), which governs trackage rights, justify a different construction of the identical statutory phrase.[12] The D.C. Circuit surmised that Amtrak's use of Section 402(d) to condemn tracks when its ultimate need was simply trackage rights over a well-maintained line "implicates questions of statutory construction and congressional intent, including Congress's policy against cross-subsidization within the rail industry * * * not germane" to Amtrak's use of 45 U.S.C. 545(d), the provision at issue in *Two Parcels*. Pet. App. 2a. But in balancing those policy concerns, the court overlooked the congressionally mandated role of *ICC* regulatory oversight as a means of implementing general statutory policies, including any applicable policy against cross-subsidization.

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[12] The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986); *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990).

Two sources of ICC authority serve to protect the federal rail policies implicated by condemnations. First, the Commission has the power to reject proposed condemnations under Section 402(d) if the transaction constitutes an abuse of RPSA.[13] Here, for example, the ICC determined that Amtrak was not using condemnation to further private aims of Central Vermont and its parent company, but was pursuing public purposes in seeking to restore Montrealer train service. Pet. App. 41a-43a. In the unlikely event that Amtrak were to condemn property in order to promote a scheme to benefit private parties, ICC regulation would be available and sufficient to guard against the consummation of the scheme.

Second, not only the initial condemnation but also the reconveyance of condemned property by Amtrak is subject to ICC regulation. Under 49 U.S.C. 11343, the ICC has exclusive and plenary authority to determine, *inter alia*, when carriers may purchase, lease, or contract to operate property of another carrier. Cf. *Norfolk & Western Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 76 (1944). Amtrak, as a common carrier by railroad, is subject to ICC regulation under Section 11343, see 45 U.S.C. 546(a); so too, of course, is any railroad to which Amtrak seeks to convey rail property. Accordingly, if the ICC concludes that a particular re-

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[13] Congress made that power explicit in ISBA by conditioning retransfers upon an ICC finding that the conveyance "further the purposes" of RPSA, 104 Stat. 4658, but even before the amendment, the ICC had the power to reject abusive applications under Section 402(d). Cf. *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 364-365 (1984).

conveyance would compromise any relevant rail transportation policy, see 49 U.S.C. 10101a, the ICC can block the transaction.[14] In this case, for example, the ICC examined the facts and concluded that application of Section 11343 to Central Vermont's acquisition of the Conn River Line was not required to fulfill the rail transportation policy, see 49 U.S.C. 10505(a); accordingly, it exempted the transaction from prior approval requirements. A total prohibition on reconveyance transactions to protect relevant statutory policies, however, not only finds no support in the language of the statute, but would needlessly erode Amtrak's flexibility and denigrate the ICC's exclusive and plenary authority to oversee rail industry transactions.[15]

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[14] The rail transportation policy includes the goals of allowing "competition * * * to establish reasonable rates for transportation by rail," "foster[ing] sound economic conditions in transportation," and "encourag[ing] * * * the elimination of noncompensatory rates for rail transportation." 49 U.S.C. 10101a(1), (5), and (10). Those policies form a basis for the ICC to protect against any improper or undesirable cross-subsidization of one segment of the rail industry by another.

[15] The court's constitutional concerns (Pet. App. 21a) about the statute as construed by the ICC are also illusory. The "public use" requirement of the Fifth Amendment's Taking Clause does not prohibit compensated transfers between private parties so long as "the legislature's purpose is legitimate and its means are not irrational," *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 242-243 (1984). That standard is surely met here with respect to Congress's decision to deploy the condemnation power to further the formation of a nationwide rail passenger system. In any event, the court did not doubt that Congress could empower Amtrak to effectuate the transaction at issue if it gave "clear[] evidence" of its intent. Pet. App. 21a. Clearer authorization than passage of the ISBA in response to the panel's decision can scarcely be imagined. See pp. 21-23, *infra*.

b. In the alternative, the court of appeals concluded that the ICC did not make "adequate findings" to establish Amtrak's need for the property. Pet. App. 3a, 18a-20a. This conclusion turns the statutory procedure on its head; Section 402(d) declares that Amtrak's "need" for railroad property "shall be deemed to be established" *unless* the ICC finds that (A) conveyance to Amtrak "would significantly impair the ability of the railroad to carry out its obligations as a common carrier," *and* (B) Amtrak can fulfill its obligations by the acquisition of an alternative property interest available for sale on reasonable terms, or available to Amtrak by the exercise of its authority to condemn non-rail private property. 45 U.S.C. 562(d)(1)(A) and (B).

In attacking the ICC's determination of Amtrak's "need," the majority also relied on an incorrect legal premise. As Judge Ginsburg recognized in her concurring opinion, the ICC correctly found that no impairment of B&M's common carrier functions is threatened here because Amtrak was required to pay compensation for the line, and B&M was offered trackage rights to serve its existing local customers. Pet. App. 25a. The majority, however, insisted that post-conveyance remedies are entirely irrelevant to the issue of impairment; instead, the majority claimed that the evaluation of impairment must be restricted to the effects of the condemnation viewed in isolation. *Id.* at 19a. But nothing in the statute dictates that illogical approach, which not only ignores the practical results of an overall transaction carried out under Section 402(d), but also impedes Amtrak's taking of *any* rail property that is useful to a railroad. As the agency authorized to implement Section 402(d), the ICC is entitled to deference in

its refusal "to put on * * * blinders" in determining whether the impairment with which the statute is concerned will come to pass.[16] Cf. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529 (1946). Because the ICC properly found the absence of any impairment to B&M, Amtrak's statutory need was established without regard to whether Amtrak had alternative property interests available to it. 45 U.S.C. 562(d)(1)(B). See Pet. App. 25a (concurring opinion).[17]

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[16] Because the ICC has express authority to impose "reasonable terms and conditions" upon condemnations, see 45 U.S.C. 562(d), the agency is well within the bounds of its discretion in taking those conditions into account in determining whether impairment will occur. See also 49 U.S.C. 11344(c), which permits the ICC to impose conditions on the subsequent reconveyance of track.

[17] Although it did not have to do so, the ICC also addressed this latter issue, concluding that no other alternative rail route through Vermont would be feasible for the Montrealer. Pet. App. 45a-46a. The majority rejected that conclusion because the ICC had not considered whether condemnation of a "lesser interest," such as an easement in the B&M rail line, would suffice. But it was for the ICC, not the court, to determine whether that was the sort of alternative interest that it had to consider. Moreover, even if the ICC were wrong on its interpretation of the criteria for establishing Amtrak's need, the court departed from sound principles governing judicial review of administrative action in failing to remand to the ICC for evaluation of the facts in light of the correct legal standard. See *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); cf. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (per curiam).

Indeed, this is what Judge Gingsburg would have done on her understanding of the statute. In Judge Ginsburg's view, Amtrak could condemn track for the purpose of transferring ownership to another railroad, but only when that type of transaction, rather than a trackage rights transaction alone,

2. If there were any doubts that the ICC, not the court of appeals, had it right in construing Section 402(d), Congress erased those doubts in ISBA. In direct response to the majority's flawed analysis, Congress made it clear through ISBA that Amtrak "may subsequently convey title or other interest in [condemned] property to a third party, if such reconveyance is found by the [ICC] to further the purposes of this Act." Pub. L. No. 101-641, § 9, 104 Stat. 4658. The sponsor of the amendment, Senator Jeffords, explained that it was "intended to clarify the authority used by [Amtrak] in 1988 * * * to acquire a portion of the Montrealer route in the States of Vermont and New Hampshire."

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired. * * *
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purposes under [RPSA], as it did in the Montrealer situation. This leaves the structuring of the

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was truly "required" for Amtrak to provide its passenger services. Pet. App. 25a-26a. In her view, the facts as stated by Amtrak would justify application of that theory here, but the ICC had not made a determination on the point. *Id.* at 27a. Although we do not believe that a more specific determination by the ICC as contemplated by the concurring opinion is required, if it is, the proper course would be to "remand this matter to the ICC for a clear and satisfactorily reasoned statement of its decision." *Id.* at 4a (statement by Judge Ginsburg regarding the petitions for rehearing).

> nationwide rail passenger system to Amtrak's considered discretion, as [RPSA] intends.

136 Cong. Rec. S17,668 (daily ed. Oct. 27, 1990).[18]

Rather than faithfully applying the amendment, the court effectively nullified it. The court dismissed the amendment by characterizing it as providing authority only for Amtrak to convey property after a valid condemnation, not as changing the court's conclusion that rail property cannot be condemned where Amtrak could get by with a lesser property interest or with trackage rights. Pet. App. 3a. That interpretation not only flies in the face of congressional intent, it also eviscerates the amendment, by ensuring that whenever Amtrak intends to convey property it has condemned, the condemnation will be invalid because Amtrak—by definition—will be seeking a greater property interest than it requires.

The result under the court of appeals' approach is that the amendment will serve no purpose at all. Amtrak did not require the authority set forth in the amendment in order to reconvey property acquired through condemnation. Amtrak is vested with the normal powers of a District of Columbia corporation, see 45 U.S.C. 545(a), and can transfer rail property if it complies with regulatory provisions in the Interstate Commerce Act, see 49 U.S.C. 11343. The amendment makes sense only if read to authorize Amtrak to do exactly what it did here: condemn a property interest for the purpose of transferring that

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[18] Congress provided that the amendment "shall apply to any proceedings instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment)." Pub. L. No. 101-641, § 9(b), 104 Stat. 4658. See *Kaiser Aluminum & Chemical Corp.* v. *Bonjourno*, 110 S. Ct. 1570, 1577 (1990).

interest to another party, provided the ICC finds that the transaction "further[s] the purposes" of RPSA. The court's reading not only defeats the normal rule of statutory construction that "a court should give effect, if possible, to every clause and word of a statute," *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990), but also represents a particularly egregious error because the amendment was plainly designed to correct the court's mistaken statutory holding in this very case.

3. Although this is the first case in which Amtrak has felt it necessary to call upon its condemnation power to effect a reconveyance of rail property to another carrier, the decision below, by stripping Amtrak of that option, has significant practical implications. Those implications, and the unjustified refusal of the court of appeals to follow the will of Congress, warrant this Court's review.

First, because any ICC order effectuating a condemnation by Amtrak can be challenged in the D.C. Circuit, 28 U.S.C. 2342(5), 2343, the ICC will, as a practical matter, be foreclosed from litigating this issue in any other court of appeals. The D.C. Circuit's incorrect conclusion therefore takes on the status of a nationwide precedent.

Second, the result in this case denies Amtrak a vital remedy afforded by Congress to prevent disruptions to its intercity passenger service. This case demonstrates the inadequacies of the alternative remedies left to Amtrak under the court of appeals' holding. Before resorting to condemnation, Amtrak attempted to enforce its contractual right to have B&M maintain the Conn River Line in condition fit for high-speed travel. But B&M refused to negotiate or arbitrate, and, indeed, repudiated its contract with Amtrak. See Pet. App. 130a n.11. To compel arbitration, Amtrak was forced to invoke the assistance

of the courts. See note 3, *supra*. That protracted history of broken promises and delayed enforcement belies the majority's sanguine assumption—contrary to the judgment of Congress—that Amtrak's power to conscript trackage rights is sufficient. Where a railroad, for reasons of its own, declines to fulfill maintenance obligations that are indispensable to Amtrak's use of the tracks, Amtrak needs more; while the railroad balks, Amtrak's trains sit idle. Section 402(d) provides an answer to such dog-in-the-manger tactics, ensuring an avenue for swift action to prevent service disruptions.[19]

Third, the court's holding, particularly in the face of ISBA's effort to overturn its initial decision, thwarts the continuing fulfillment of a policy objective for which Congress has manifested special solicitude: the rehabilitation and maintenance of the Montrealer, and the uninterrupted provision of passenger train service to Vermont in particular and the New England States in general. Twice in the past three years Congress has taken specific legislative action to fund and repair the segment of track at issue in this case. The decision below stymies Amtrak in its realization of that important congressional goal. If the ownership of the track reverts to B&M, passengers, state governments, and businesses that depend on reliable public transportation to this region of the country may well be denied a means to that

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[19] See 45 U.S.C. 562(d)(2) (requiring the ICC to expedite condemnation proceedings and issue its order no later than 120 days from Amtrak's application); Pet. App. 124a-125a (ICC expedited this proceeding because of Amtrak's concerns, *inter alia*, that swift measures were necessary to avert further deterioration of the track and to complete the repair before the winter freeze).

end that Congress plainly desired them to have.[20] And, such service disruptions cause more widespread harm by damaging consumer confidence in the public transportation alternative that Amtrak exists to provide.

Fourth, the court's unjustified abridgement of Amtrak's condemnation power threatens to have broad ramifications for Amtrak's relationship with the freight railroads. Because Amtrak's mission is to run passenger trains, it rarely requires exclusive use of a line of track. It is, therefore, neither efficient nor feasible for Amtrak to make do on its own; it must be able to share the freight railroads' existing systems of track on reasonable and economical terms. Over the next few years, many of Amtrak's trackage rights agreements will expire and must be renegotiated. Having established its passenger routes during the first 20 years of its existence, Amtrak's site requirements are well-entrenched, and its negotiating position concomitantly weakened. Freight carriers are doubtless aware of Amtrak's inability to risk the loss of passengers by making major route and service changes.

It is precisely that sort of inflexibility in requirements and lack of negotiating leverage that Congress intended to remedy through Section 402(d). Congress was aware that Amtrak's "inflexible site requirements" might leave it open to economic exploita-

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[20] When it had ownership, B&M allowed the line to deteriorate to the point where Amtrak's trains averaged 17 miles per hour, which prolonged each trip by two hours. See C.A. App. 903, 905-906. Two years elapsed before Amtrak, aided by a special congressional grant, was able to resume service over the line. Without Section 402(d) as a remedy, Amtrak would again encounter great difficulties in preventing the line from falling into disrepair.

tion by the railroads, see S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973); the legislative solution was to open up the possibility of condemnation. Although in theory Amtrak remains free under the decision below to condemn property if it wishes to become the operator of the track, that option is a hollow one in most settings, for Amtrak lacks both the resources and the expertise to take on the responsibility of managing a far-flung empire of discrete islands of track. As the concurrence recognized, the majority's interpretation leaves Amtrak "vulnerable to just the sort of extortion by private landowners pointed to by [the majority] as having motivated Congress to confer the eminent domain power contained in section 402(d)." Pet. App. 27a. If exposed to that "extortion," the added expense of maintaining a rail passenger system will undoubtedly be thrust upon the federal fisc, which already is required to make a substantial contribution to fund Amtrak's operations. See 45 U.S.C. 601. Section 402(d), properly construed, furnishes Amtrak with the leverage needed to secure reasonable negotiated settlements.

Fifth, the D.C. Circuit's striking course of decision in this case is itself a justification for this Court's review. The language of Section 402(d), prior to its amendment, did not speak in "clear" and "unambiguous" terms to the question at issue here; accordingly, under *Chevron* it was for the ICC, not the court, to balance the relevant policies. Even more remarkable, however, is the court's action on rehearing. Despite the enactment of ISBA, and its unmistakable clarification of the law, the court refused to bow to Congress's judgment. The court of appeals was not entitled to hold for naught legislation specifically designed to correct its initial mistake. Accord-

ingly, review by this Court is warranted. Indeed, given the clarity of the court's error in failing to implement ISBA's amendment of Section 402(d), the Court may wish to consider summary reversal of the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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